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91-1856

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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

TRIPLE M DRILLING COMPANY,
AND GARY MORRISON,
Petitioners,

v.

KATHRYN SEIDER, TOMMY HUDGINS,
PATRICK MORRISSEY, AND
THE FEDERAL DEPOSIT INSURANCE
CORPORATION, AS RECEIVER FOR
MBANK HOUSTON, NATIONAL
ASSOCIATION
Respondents.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

IN A CASE OF LENDER LIABILITY, DOES A WRITTEN SUBORDINATION AGREEMENT, NEGOTIATED TO EXTEND THE DUE DATE OF AN EXISTING CREDIT AGREEMENT AND INTEGRATED WITH THE CREDIT AGREEMENT, BAR THE FDIC'S "SUPER DEFENSES" UNDER *D'OENCH, DUHME V. FDIC*, 315 U.S. 447 (1942)?

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KATHRYN SEIDER, TOMMY HUDGINS,
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****

Petition for Writ of Certiorari
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PETITION FOR WRIT OF CERTIORARI

The Petitioners TRIPLE M DRILLING COMPANY[1] and GARY MORRISON respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on February 18, 1992.

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[1]There are no parent or subsidiary companies involved.

OPINIONS BELOW

United States District Judge Lynn N. Hughes entered a final judgment (FED. R. CIV. P. 58) against Triple M. Drilling Company ("Triple M") and Gary Morrison ("Morrison") based on the bank officers' (the Respondents will be collectively referred to in this manner) motion for summary judgment (FED. R. CIV. P. 56) on April 30, 1991. The court's opinion was delivered from the bench, and the transcript is reproduced as Tab 6 in the Record Excerpts below. The final judgment is reproduced here as Appendix B.

On February 18, 1992, in an unpublished opinion, a panel of the United States Court of Appeals for the Fifth Circuit affirmed Judge Hughes. The opinion is reproduced as Appendix "A".[2]

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its Judgment affirming the District Court on February 18, 1992. There was no petition for rehearing.

This Court has jurisdiction to review that Judgment pursuant to 28 U.S.C.A. § 1254(1) (1966).

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[2]A Petition for Writ of Certiorari in a related Fifth Circuit case, No. 91-1303 styled *Triple M Drilling Co. v. FDIC*, was filed prior to the decision below in the instant petition. At the time of filing of the instant petition, this Court has not acted in cause No. 91-1303. Consolidation in accordance with Sup. Ct. R. 27.3 may be appropriate.

STATEMENT OF THE CASE

This case does not present a fact-bound issue. The District Court decided, as a matter of law, that "[e]xtend credit does not mean extend due date, not in English and not at law" (Tab 6 to the Record Excerpts below, p. 4). That holding is contrary to law and results from a misapplication of the rule of *D'Oench, Duhme v. FDIC*, 315 U.S. 447 (1942) and is the central issue in the case.

Triple M Drilling Company was a Houston, Texas oil and gas drilling contractor. Gary Morrison was a founder, officer, and director of Triple M. In the oil patch, he was the identity of the company.

At the urging of its banker, Triple M started a revolving line of credit with MBank Houston to finance receivables from the operators for whom it was drilling wells. The line was secured by operating revenue and shareholder equity. It was raised several times, eventually to $750,000. A commercial revolving credit note in that amount was executed. It was to mature and come due on March 3, 1987.

Shortly after beginning operations in 1985, Triple M bought two drilling rigs from United States Steel's Oilwell Division ("Oilwell"). Oilwell financed the purchase, with Triple M giving a lien on receivables from the rigs as security.

At the zenith of its operations, Triple M had five land rigs working and was planning the acquisition of four more land and one offshore rig. They were drilling for large operators like Chevron, Sohio, and Amoco and for small independents with unfinancable names -- wildcatters -- as well.

The oil business, from exploration and production through delivery and sale of refined products, is fraught with risks. For the driller, a major one is geology. When drilling a turnkey well -- that is, one at a fixed price -- if a section of pipe breaks and the drill head has to be fished out; if the mud needed to equalize drilling pressure is inadequate and there is a blowout; or if impenetrable rock appears where the studies and reports said there was shale, the drilling contractor could be spiraling into a financial abyss. Another risk for the driller is the continuing ability of an operator to pay for the well.

In the early winter of 1986, one of Triple M's operators reported that it was not timely able to pay in full for a completed well. This situation occasioned a plan to restructure Triple M's debt service for 1987. Part of the plan was an equity infusion from shareholders. In December 1986, they contributed $400,000 cash, pledging an additional $600,000, and negotiations with MBank began.

Ultimately, MBank agreed that if Oilwell would subordinate the lien it had on Triple M receivables it would extend the $750,000 note through December 31, 1987. A written Subordination Agreement dated March 25, 1987 reflecting this purpose, but without the date, was approved by MBank's loan committee, executed by all parties, and has been continuously since the date of its execution, an official MBank record.

In May 1987 a Triple M turnkey drilling job in Louisiana got stuck before reaching the contract depth. Morrison renegotiated the contract price with the operator so Triple M would be paid for additional work, but when he reported the situation to MBank, the bank acted precipitately. The next day, a Friday pay day, with no request and no notice, acting in concert and without cause or authority, the

bank officers for the first time treated the note as overdue and offset Triple M's operating account--over $330,000--to pay on it. Rig hands and suppliers went unpaid, the bank officers notified all of Triple M's operators to make future Triple M payments directly to the bank and they put the word out in the oil patch--Triple M's checks were hot checks. Triple M, which had survived $8.00 a barrel oil, was killed by this unauthorized conduct; Gary Morrison was through in the oil business. A Chapter 11 bankruptcy petition was filed the Monday following the offset.

How The Federal Question Was Presented

With the authorization of the bankruptcy court Triple M, and Morrison, filed suit for non-federal contract and tort claims in the Texas state courts. The case was fully discovered and prepared for trial, which was set for January 28, 1991. In November, 1989, however, MBank failed and the FDIC became its Receiver.

The bank officers filed a third-party claim of indemnity against the FDIC as receiver for MBank. The FDIC acted only in its capacity as receiver, not in its corporate one, and to the provisions of 80 Stat. 1055 (1966), 12 U.S.C.A. § 1819 "Fourth" (1989) and 28 U.S.C.A. § 1446 (1973 and Supp. 1991), the suit was removed to the United States District Court for the Southern District of Texas.

REASONS FOR GRANTING THE WRIT

This case presents important issues requiring uniform federal application of the FDIC's "super defenses" in cases of lender liability of failed banks where the borrower is

wholly innocent. It requires no citation to authority to say that the crisis in the banking and savings and loan industry has generated an avalanche of litigation, and it is likely that the "super defenses" issue is involved in virtually every takeover of a federally-insured institution. Shepard's Citator currently has twenty-one columns of federal citations to either the case or the statute defining these "super defenses," yet this Court has substantively addressed them but once since their establishment, while the Circuits have expanded their reach far beyond this Court's holding. This Court should establish a uniform rule for the federal courts where a borrower is wholly innocent and is making claims or defenses based on a written agreement.

I.

THE DECISION OF THE FIFTH CIRCUIT IS IN CONFLICT WITH A DECISION OF THIS COURT

Other than to cite it for its holding on the uniform application of federal law, this Court has only discussed the decision in *D'Oench, Duhme v. FDIC*, 315 U.S. 447 (1942) on two occasions.

In *United States v. Yazell*, 382 U.S. 341 (1966), the Court described *D'Oench* as holding, "... that FDIC was entitled to a federal rule protecting it against misrepresentations as to the financial condition of the banks it insures, accomplished by secret arrangements inconsistent with the policy of the applicable federal statutes." *Id.* at 354.

Langley v. FDIC, 484 U.S. 86 (1987), found both the *D'Oench, Duhme* doctrine and 64 Stat. 889 [as amended 12 U.S.C.A. § 1823(e)] tied in their applicability to the rule of secret or side agreements, schemes or arrangements likely to mislead banking authorities. *Id.* at 91-92, 92-93.

The note in this case was foreclosed on almost two years before MBank's failure and the FDIC's receivership. There being no suggestion in the record that Triple M or the individuals lent themselves to any scheme or artifice to deceive or mislead bank examiners, and since the Subordination Agreement reflecting the extension of credit complies with all the requirements of 64 Stat. 889 [as amended 12 U.S.C.A. § 1823(e)] should the statute apply, the decision below is in conflict with decisions of this Court.

II.

THE FIFTH CIRCUIT'S APPLICATION OF THE *D'OENCH, DUHME* DOCTRINE, WHERE LENDER LIABILITY WAS BASED ON A WRITTEN INSTRUMENT REQUIRING INTERPRETATION, IS IN CONFLICT WITH TEXAS COMMON LAW OF CONTRACT INTERPRETATION

Triple M's renegotiation of its line of credit at Mbank began in December 1986. All of the parties -- Triple M, Oilwell, and MBank -- were fully aware of what was being negotiated and why. Triple M needed to extend its line of credit from March 3, 1987 to December 31, 1987 to stay in business. Oilwell and MBank wanted Triple M to stay in business, but MBank wanted a more secure position before it would extend Triple M's line of credit. Significantly, the parties' negotiations extended past the line of credit note's

due date without demand or notice.[3]

On the 31st of March, the Subordination Agreement, drafted by MBank, containing the following language, was fully executed.

> NOW, THEREFORE, to induce Bank to extend or continue to extend credit to the Debtor from time to time, and/or make or continue to make loans, advances, payments, or other financial accommodations with and to the Debtor, and in consideration of the premises, the mutual covenants contained herein and the extensions of credit, loans, advances, payments or other financial accommodations made or to be made or continued by MBank to the Debtor, the Debtor and Creditor hereby agree with Bank as follows . . . (R. 456).

The document as a whole can be read to see that Oilwell gave valuable consideration to MBank in return for the bank extending Triple M's $750,000 revolving line of credit note through the end of the year. The reader to make that judgment should have been a jury, however, not the judge.

Since there is no federal rule of contract interpretation in a context such as this [*Vernon v. Resolution Trust Corp.*, 907 F.2d 1101, 1109 (11th Cir. 1990) (deciding the meaning

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[3]The note required notice of acceleration and demand, in writing, by U. S. mail, in the event Triple M did not pay the note when due. [Tab 8, Record Excerpts below] No demand or notice was made at any time.

of an "acquisition agreement' with the FSLIC)[4]], Texas law must be applied. The Texas rules of contract interpretation require the denial of summary judgment.

If a written instrument is reasonably susceptible to more than one meaning, in Texas extraneous evidence is admissible to determine the true meaning of the instrument and summary judgment is improper. *R&P Enterprises v. LaGuarta, Gavrel, & Kirk*, 596 S.W.2d 517, 519 (Tex. 1980); *see also, City of Pinehurst v. Spooner-Addition Water Co.*, 432 S.W.2d 515, 519 (Tex. 1968).

Significantly, from March 3, 1987 through May 15, 1987 (the day of the offset of Triple M's operating account), both MBank and Triple M treated the revolving credit note as extended and not yet due. In light of the, at worst, ambiguous language of the Agreement, MBank's conduct is a vivid indication of intent and creates an issue not appropriate for summary judgment. *Mapco v. Pioneer*, 615 F.2d 297, 301 (5th Cir. 1980); *Portsmouth Baseball Club v. Frick*, 278 F.2d 395, 400-401 (2d Cir. 1960), *cert. denied*, 364 U.S. 831.

The effect and interpretation of the Subordination Agreement are questions for the jury after it hears the evidence necessary to consider the same in the light of the circumstances surrounding the Agreement's execution. *City of Pinehurst*, 432 S.W.2d at 519.

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[4]*Accord: Fidelity Savings and Loan v. de la Cuesta*, 458 U.S. 141, 174 (1982); *Kaiser Steel Corp. v. Mullins*, 455 U.S.72, 77 (1982).

CONCLUSION

Because the decisions below are in conflict with decisions of this Court and are contrary to the applicable Texas rule of contract interpretation, this Petition for a Writ of Certiorari should be granted. In the alternative, because of the improper grant of summary judgment, the case should be summarily reversed and remanded.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-2523
Summary Calendar

TRIPLE M DRILLING COMPANY
& GARY MORRISON,

Plaintiffs-Appellants,

versus

KATHRYN SEIDER, ET AL.,

Defendants-Appellees.

and Third Party Plaintiffs,

THE FEDERAL DEPOSIT INSURANCE
CORPORATION AS RECEIVER FOR MBANK
HOUSTON,

Third Party Defendants-Appellees.

Appeal from the United States District Court
For the Southern District of Texas
(CA-H-90-3823)

(February 18, 1992)

Before POLITZ, Chief Judge, SMITH, and EMILIO M. GARZA, Circuit Judges.

POLITZ, Chief Judge:*

Alleging procedural and substantive errors, Triple M. Drilling Company and Gary Morrison appeal an adverse summary judgment. Finding no error, we affirm.

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Background

Morrison is Chairman of the Board of Directors of Triple M which obtained a line of credit from MBank Houston, N.A., and executed a $750,000 revolving note with a maturity date of March 3, 1987. Triple M secured the note with its accounts receivable and granted MBank the right to set off any deposit accounts against the debt and to notify Triple M's debtors in the event of default. When the note was not paid as required, MBank set off Triple M's accounts. The instant litigation is based on Triple M's interpretation of a subordination agreement executed after the note became overdue and before the setoff. In this agreement another creditor of Triple M subordinated its security interest in Triple M's accounts receivable to MBank's security interest in those receivables. Conceding in their pleadings that MBank refused to sign an extension of the revolving note, Triple M and Morrison nonetheless claim that the subordination agreement effected such an extension. The subordination agreement contains the following language in a preamble to a list of terms:

> NOW, THEREFORE, to induce [MBank] to extend or continue to extend credit to [Triple M] from time to time, and/or make or continue to make loans, advances, payments or other financial accommodations with and to [Triple M], and in consideration of the premises, the mutual covenants contained herein and the extensions of credit, loans, advances, payments or other financial accommodations made or to be made or continued by [MBank] to [Triple M] and [the

> subordinating creditor] hereby agree with [MBank] as follows:

Multiple terms follow. In addition to securing MBank's superior rights in the accounts receivable, the terms provide that MBank may "without impairing or releasing any of [MBank's] rights, ... change the amount, manner, place or terms of payment of, or change or extend the time of payment of, or renew or alter the Bank Note in any and all respects. ..."

Triple M filed suit against MBank; MBank subsequently became insolvent. In the suit against MBank the district court held that MBank's breach of contract, breach of good faith and fair dealing, and fraud claims, as asserted against the FDIC as Receiver of MBank, were foreclosed by the doctrine of *D'Oench Duhme & Co. v. FDIC*, 315 U.S. 447 (1942) and 12 U.S.C. §1823(e). We affirmed. *See Triple M Drilling Co. v. MBank Houston, N.A.*, No. H-89-1511 (S.D. Tex. Aug. 9, 1990), *aff'd*, No. 90-2999 (5th Cir. Nov. 19, 1991); *see also, Clay v. FDIC*, 934 F.2d 69 (5th Cir. 1991) (an inference of a secret agreement in bank documents will not withstand *D'Oench Duhme*). Triple M filed the instant action for breach of contract, breach of good faith and fair dealing, fraud, and tortious interference against the appellees, former officers of MBank. The appellees in the principal action in turn filed third-party complaints against the FDIC as Receiver for MBank. The district court granted summary judgment for the bank officers and the FDIC. Triple M and Morrison appeal.

Analysis

Summary judgment is appropriate if the record discloses "that there is no genuine issue as to any material

fact and the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). We review the district court's grant of summary judgment *de novo*.

Morrison does not have standing to sue for the actionable wrongs committed against Triple M. *Renfro v. FDIC*, 773 F.2d 657 (5th Cir. 1985); *Wingate v. Hajdik*, 795 S.W.2d 717 (Tex. 1990). Triple M's claims for breach of contract, breach of good faith and fair dealing,[1] and fraud are barred by claim preclusion. *See Lubrizol Corp. v. Exxon Corp.*, 871 F.2d 1279 (5th Cir. 1989). Claim preclusion bars the parties to a prior proceeding, or those in privity with them, from relitigating the same claims that were subject to a final judgment on the merits by a court of competent jurisdiction. *Lubrizol*. In the first suit against MBank, we affirmed the grant of summary judgment on identical breach of contract, breach of good faith and fair dealing, and fraud claims. *Triple M Drilling Co. v. MBank Houston, N.A.*, No. H-89-1511 (S.D.Tex. Aug. 9, 1990), *aff'd*, No. 90-2999 (5th Cir. Nov. 19, 1991).[2] The only difference between the

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[1]Regarding Triple M's claim for breach of good faith and fair dealing, we note that in any event, "'[u]nder Texas law there is no general fiduciary obligation between a lender and a borrower or between business parties.'" *Clay v. FDIC*, 934 F.2d 69, 72 (5th Cir. 1991) (quoting *In re Letterman Bros. Energy Secs. Litig.*, 799 F.2d 967, 975 (5th Cir. 1986), *cert. denied*, 480 U.S. 918 (1987)); *FDIC v. Coleman*, 795 S.W.2d 706 (Tex. 1990).

[2]The district court in *Triple M Drilling Co. v. MBank Houston, N.A.* found that breach of contract and good faith, and fraud claims were barred by section 1823(e), but the court allowed a tortious interference claim that did "not depend upon the validity of the alleged agreements." *Triple M Drilling Co. v. MBank Houston, N.A.*, No. H-89-1151, Slip Op. at 3. *See Campbell Leasing, Inc. v. FDIC*, 901 F.2d 1244 (5th Cir. 1990). We do not address whether the tortious interference claim in the

final judgment in the prior suit and the instant litigation is that here Triple M has sued MBank's officers. Because Triple M's claims against the officers are for actions within the scope of their duties as MBank employees, identity of parties exists for purposes of claim preclusion. *Lubrizol Corp.*

In its tortious interference claim, Triple M argues that MBank interfered with Triple M's ability to conduct business by dishonoring checks and asking debtors to direct payments to MBank. The elements of a cause of action for tortious interference under Texas law are: (1) a contract, (2) an intentional act calculated to cause damage and interfering with the contract, (3) actual damages caused by the intentional act, and (4) the lack of any justifiable cause or excuse on the part of the defendant. *Haralson v. E.F. Hutton Group, Inc.*, 919 F.2d 1014 (5th Cir. 1990). Triple M argues that MBank lacked a justifiable cause to exercise its rights under the past due revolving note because the subordination agreement had extended the note. We conclude that as a matter of law this claim is not viable.

Triple M relies solely on the agreement's preamble language that it was designed "to induce [MBank] to extend or continue to extend credit to [Triple M]." We agree with the district court that the subordination agreement between MBank, Triple M, and the subordinating creditor is not an

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first suit is the same one asserted in the instant litigation because Triple M may not bind the bank officers to the first suit. The claim preclusion is non-mutual: The officers, who were not a party to the first suit, are not bound by it. *See generally* C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* §§ 4463-64 (1981); *see also Lubrizol*, 871 F.2d at 1289 & n.15. We do not, in any event, address the application of section 1823, as we find summary judgment appropriate on the grounds articulated by the district court.

agreement to extend the revolving note, which was an existing parallel debt. The meaning of an unambiguous contract is a purely legal question that may be resolved by summary judgment. *South Central Bell Telephone Co. v. Canal Place Ltd. Partnership*, 927 F.2d 867 (5th Cir. 1991). Whether a contract term is ambiguous is a question of law reviewed *de novo*. *Forest Oil Corp. v. Strata Energy, Inc.*, 929 F.2d 1039 (5th Cir. 1991). A Texas court will deem a contract unambiguous when it is reasonably open to only one interpretation when one considers standard rules of interpretation and the surrounding circumstances. *Hanssen v. Qantas Airways Ltd.*, 904 F.2d 267 (5th Cir. 1990).

The subrogation agreement may not be given the interpretation advanced by Triple M. The preamble language emphasized by Triple M does not identify the note. None of the many terms provide for the note's extension. Further, the agreement does not set, or even reference, a new maturity date. Because the only function of an agreement to extend the note would be to set a new due date, the absence of this term would render the alleged agreement, if we took it to be such, indefinite and unenforceable under Texas law. *See Bank of El Paso v. T.O. Stanley Boot Co.*, 809 S.W.2d 279 (Tex.App. 1991); *University National Bank & Ernst & Whinney*, 773 S.W.2d 707 (Tex.App. 1989) (citing *Moore v. Dilworth*, 142 Tex. 538, 179 S.W.2d 940 (1944)) (an agreement must define the terms necessary for its enforcement). Triple M may not ask a jury to supply an essential contract term. *Id.* Even if we were to find an ambiguity and look beyond the four corners of the document to discern the meaning of the preamble phrase, it is still clear that MBank did not commit to an extension. Triple M stated in its pleadings that MBank expressly refused to sign an extension of the note.

Triple M complains that the district court had instructed it not to file a brief in opposition to the appellee's summary judgment motion. The record reflects that Triple M received notice of and attended a hearing on the summary judgment motion, and was allowed to submit written memoranda with a motion for rehearing. We perceive no error arising out of the matter complained of. Triple M has not identified any relevant evidence it was not permitted to introduce nor has it pointed to any error of law about which we are persuaded. Triple M has, therefore, not acquitted its burden of identifying a reversible error on appeal.

For the reasons assigned, the district court is AFFIRMED.

APPENDIX B

United States District Court Southern District Of Texas

TRIPLE M DRILLING COMPANY, *et al.*, Plaintiffs,	§	
	§	CIVIL ACTION H-90-3823
versus	§	
KATHRYN SEIDER, Defendant.	§	

FINAL JUDGMENT

Triple M Drilling Company and Gary Morrison take nothing from Kathryn Seider, Tommy Hudgins, and Patrick Morrissey.

Kathryn Seider, Tommy Hudgins, and Patrick Morrissey take nothing from MBank Houston.

SIGNED on April 30th, 1991, at Houston, Texas.

/S/ Lynn N. Hughes
UNITED STATES DISTRICT JUDGE